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No. 01-618

IN THE

Supreme Court of the United States

ERIC ELDRED, *et al.*,

Petitioners,

v.

JOHN D. ASHCROFT, in his official capacity as Attorney General,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES

I. THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, NO. 99-CV-65

1.	1/11/99	Complaint
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5.	6/25/99	Answer to second amended complaint
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8.	6/28/99	Second amended complaint
9.	7/14/99	Brief by *amici curiae* Sherwood Lit. Trust, Sherwood Anderson, ASCAP, Amsong, Inc., Assoc. Amer. Publish, Broadcast Music Inc., Motion Picture Assn., National Music Pub. Assoc., Recording Industry, And Songwriters Guild as amici curiae in support of defendant's motion for judgment on the pleadings
10.	7/23/99	Plaintiffs' motion for judgment on the pleadings or, in the alternative, for summary judgment (including Declaration of Dennis J. Karjola and Affidavit of Hal R. Varian)
11.	8/23/99	Defendant's memorandum in opposition to plaintiffs' motion for judgment on the pleadings or, in the alternative for summary judgment
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14.	9/10/99	Plaintiffs' reply in support of their motion for judgment on the pleadings or, in the alternative, for summary judgment
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17.	11/17/99	Judgment
18.	12/17/99	Notice of appeal

II. UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, NO. 99-5430

1.	12/29/99	Notice of appeal docketed
2.	5/22/00	Appellants' brief
3.	5/22/00	Joint appendix
4.	6/6/00	Brief of *Amici Curiae* Lyman Ray Patterson, Laura N. Gassaway, and Edward Walterscheid in support of appellants
5.	6/6/00	Brief of *Amicus Curiae* Eagle Forum Education and Legal Defense Fund
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7.	7/10/00	Appellee's Brief
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9.	7/26/00	Appellee's corrected opposition brief
10.	8/7/00	Appellants' corrected reply brief
11.	10/24/00	Transcript of oral argument held on 10/5/00.
12.	2/16/01	Judgment
13.	2/16/01	Opinion
14.	2/20/01	Amended opinion
15.	4/2/01	Petition for rehearing and suggestion for rehearing en banc
16.	5/14/01	Appellee's response to petition for rehearing and suggestion for rehearing en banc
17.	7/13/01	Opinion on petition for rehearing
18.	7/13/01	Order denying suggestion for rehearing en banc with statement of Circuit Judge Sentelle, joined by Circuit Judge Tatel, dissenting.
19.	7/13/01	Order denying petition for rehearing
20.	8/1/01	Mandate

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ERIC ELDRED, ELDRITCH PRESS, HIGGINSON BOOK COMPANY, JILL A. CRANDALL, TRI-HORN INTERNATIONAL, LUCK'S MUSIC LIBRARY, INC., EDWIN F. KALMUS & CO., INC., AMERICAN FILM HERITAGE ASSOCIATION, MOVIECRAFT, INC., DOVER PUBLICATIONS, INC., and COPYRIGHT'S COMMONS,	)	
Plaintiffs,	)	
v.	)	Case No. 1:99 CV00065 JLG
JANET RENO, in her official capacity as Attorney General of the United States,	)	
Defendant.	)	

SECOND AMENDED COMPLAINT

This is an action for declaratory relief pursuant to 28 U.S.C. § 2201. Plaintiffs seek declaratory judgment that § 102(d)(1)(B) of the Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827 ("CTEA"), amending 17 U.S.C. § 304(b), is unconstitutional. Plaintiffs also seek preliminary and permanent injunctive relief against the criminal enforcement of § 2(b) of the No Electronic Theft Act of 1997, Pub. L. No. 105-147, 111 Stat. 2678 ("NET Act"), amending 17 U.S.C. § 506(a), with respect to works that would not have a valid copyright but for the enactment of § 102(d)(1)(B) of the CTEA.

PARTIES

1. Plaintiff Eric Eldred resides at 50 E. Derry Rd #21, E. Derry, New Hampshire, 03041-0021.

2. Plaintiff Eldritch Press is a non-profit unincorporated association located at 50 E. Derry Rd #21, E. Derry, New Hampshire, 03041 and found on the Internet at http://eldred.ne.mediaone.net. Eldritch Press's principal activity is to post literary works on the Internet in order to make them freely available to the entire world. Plaintiff Eldred is the Director of Eldritch Press.

3. Plaintiff Higginson Book Company ("Higginson") is located at 148 Washington Street, Salem, Massachusetts, 01970. Higginson is a for-profit sole proprietorship operated by Robert A. Murphy. Higginson reprints books based on consumer demand in fields such as genealogy, historic maps, local and county history, and the Civil and Revolutionary Wars.

4. Plaintiff Jill A. Crandall resides at 134 Buckeye Branch Drive, Athens, Georgia, 30605. Plaintiff Crandall is the choir director at St. Gregory the Great Episcopal Church in Athens, Georgia.

5. Plaintiff Tri-Horn International is a Massachusetts corporation located at 38 Surfside Road, P.O. Box 424, Scituate, Massachusetts, 02055. Tri-Horn International is in the business of developing and selling products involving the history and traditions of golf.

6. Plaintiff Luck's Music Library, Inc. is a Michigan corporation located at P.O. Box 71397, 32300 Edward, Madison Heights, Michigan, 48071. Luck's Music Library, Inc. is in the business of selling and renting classical orchestral sheet music.

7. Plaintiff Edwin F. Kalmus & Co., Inc. is a Florida corporation located at P.O. Box 5011, Boca Raton, Florida,

33431. Edwin F. Kalmus & Co., Inc. publishes orchestral sheet music.

8. Plaintiff American Film Heritage Association is a non-profit film preservation group that was established to represent documentary film makers, film preservationists, scholars, commercial archives and non-profit archives. The American Film Heritage Association is located at P.O. Box 438, Orland Park, Illinois, 60462.

9. Plaintiff Moviecraft, Inc. is a commercial film archive incorporated in Illinois and located at P.O. Box 438, Orland Park, Illinois, 60462.

10. Plaintiff Dover Publications, Inc. is a New York corporation located at 31 East 2nd Street, Mineola, New York, 11501. Dover Publications, Inc. is a large-scale commercial book publisher.

11. Plaintiff Copyright's Commons is a non-profit coalition located on the Internet at http://cyber.law.harvard.edu/cc and at The Berkman Center for Internet & Society, 1563 Massachusetts Avenue, Cambridge, Massachusetts, 02138. Copyright's Commons serves as a collective voice for students, professors, archivists and other members of the public who are concerned about the negative effects of copyright term extensions on the public domain.

12. Defendant Janet Reno is the Attorney General of the United States. Defendant Reno is responsible for the enforcement of the criminal laws of the United States, including the NET Act.

JURISDICTION AND VENUE

13. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1361 and 2201, because this declaratory judgment action challenges the constitutionality of a federal statute. There is personal jurisdiction over

defendant Reno. Venue is properly laid in this District under 28 U.S.C. § 1391(e).

STANDING

14. Plaintiffs have standing to bring and maintain this action because their activities have been, and will continue to be, directly affected by the CTEA. Each of the plaintiffs uses, copies, reprints, performs, enhances, restores or sells works of music, art, film or literature in the public domain. Plaintiffs plan to continue to do so for the indefinite future. Among the works that certain of the plaintiffs were preparing to use in some way were works created in 1923 that, but for enactment of the CTEA, could have been legally copied, distributed or performed on January 1, 1999. The total retail value of such works would have exceeded $1,000.

15. The CTEA can be civilly enforced against plaintiffs and, through the NET Act, criminally enforced as well. In addition, plaintiffs' constitutional rights to freedom of expression have been chilled by enactment of the CTEA.

16. As discussed further below, the combined effects of the CTEA and the NET Act have caused each of the plaintiffs concrete and particularized injuries to their freedom of expression and their ability to use works in the public domain. The chilling effect of these laws is an actual, present injury, and the threat of enforcement against plaintiffs who violate the laws causes an imminent injury. Therefore, plaintiffs have each suffered an injury in fact, and this injury has been caused by their fear of prosecution by Defendant Reno for violations of the NET Act. These injuries can be redressed by a declaratory judgment that the CTEA is unconstitutional and by preliminary and permanent injunctive relief against the criminal enforcement of the NET Act with respect to works that would not have a valid copyright but for the enactment of the CTEA.

BACKGROUND

A. Copyrights And Copyright Terms

17. Article I, § 8 of the United States Constitution confers upon Congress authority:

> To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

Pursuant to that authority, Congress has enacted numerous laws since 1790 providing for copyrights upon a variety of literary and artistic works. Those statutes are codified at 17 U.S.C. § 101 *et seq.*

18. The duration of copyrights on literary and artistic works is generally governed by 17 U.S.C. § 301 *et seq.* Until it was amended by the CTEA, 17 U.S.C. § 304(b) provided:

> (b) Copyrights in Their Renewal Term or Registered for Renewal Before January 1, 1978.—The duration of any copyright, the renewal term of which is subsisting at any time between December 31, 1976, and December 31, 1977, inclusive, or for which renewal registration is made between December 31, 1976, and December 31, 1977, inclusive, is extended to endure for a term of seventy-five years from the date the copyright was originally secured.

19. In addition, pursuant to 17 U.S.C. § 305, copyrights are deemed to run to "the end of the calendar year in which they would otherwise expire." Therefore, prior to the enactment of the CTEA, a copyrighted work that was created, for example, on August 20, 1923, if properly renewed, would have had a subsisting copyright between December 31, 1976 and December 31, 1977, and would have had a term of 75 years from the date of the original

copyright. This term would have ended on December 31, 1998.

20. Upon the expiration of a copyright, a work comes into the public domain. This means that it may freely be copied, performed, distributed or used in the creation of derivative works by any person in the United States without the permission, license or authorization of the copyright holder.

B. The Copyright Term Extension Act Of 1998

21. On October 27, 1998, President Clinton signed into law the Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827. The CTEA amended 17 U.S.C. § 304 in relevant part as follows:

> (d) Duration of Copyright: Subsisting Copyrights.—
>
> (1) In General.—Section 304 of Title 17, United States Code, is amended-
>
> . . .
>
> (B) by amending subsection (b) to read as follows:
>
> "(b) Copyrights in Their Renewal Term at the Time of the Effective Date of the Sonny Bono Copyright Term Extension Act.—Any copyright still in its renewal term at the time that the Sonny Bono Copyright Term Extension Act becomes effective shall have a copyright term of 95 years from the date copyright was originally secured."

These changes to § 304 became effective immediately upon passage of the CTEA.

22. In general, the CTEA added twenty years to the term of most copyrights. Thus, prior to enactment of the CTEA, a work that was copyrighted during 1923 would have entered the public domain on December 31, 1998, because its term of 75 years would have ended. The CTEA,

however, extended the copyright term of such a work to 95 years, meaning that it will not enter the public domain until December 31, 2018.

C. The No Electronic Theft Act

23. The No Electronic Theft Act of 1997 (the "NET Act") criminalizes certain forms of copyright infringement. It amended 17 U.S.C. § 506(a) to provide, in relevant part:

> Section 2. Criminal Infringement of Copyrights.
>
> . . .
>
> "(a) Criminal Infringement.—Any person who infringes a copyright willfully either—
>
> "(1) for purposes of commercial advantage or private financial gain, or
>
> "(2) by the reproduction or distribution, including by electronic means, during any 180-day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than $1,000,
>
> shall be punished as provided under section 2319 of title 18, United States Code."

24. 18 U.S.C. § 2319(c), in turn, makes it a felony to violate 17 U.S.C. § 506(a)(2):

> (c) Any person who commits an offense under section 506(a)(2) of title 17, United States Code—
>
> (1) shall be imprisoned not more than 3 years, or fined in the amount set forth in this title, or both, if the offense consists of the reproduction or distribution of 10 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of $2,500 or more;

> (2) shall be imprisoned not more than 6 years, or fined in the amount set forth in this title, or both, if the offense is a second or subsequent offense under paragraph (1); and
>
> (3) shall be imprisoned not more than 1 year, or fined in the amount set forth in this title, or both, if the offense consists of the reproduction or distribution of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than $1,000.

25. The No Electronic Theft Act, as its name suggests, was enacted to criminalize the violation of copyrights through the posting of copyrighted materials on the Internet.[1] The No Electronic Theft Act does not, however, merely criminalize the posting of copyrighted materials on the Internet. The statute criminalizes *any* "reproduction or distribution . . . during any 180-day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than $1,000." 17 U.S.C. § 506(a). Therefore, anyone who uses, reproduces or distributes a copyrighted work without permission is subject to the stiff fines and prison terms of the NET Act.

26. The CTEA extended for another 20 years copyrights on all literary, musical and artistic works that, properly renewed, would have been subsisting between December 31, 1976 and December 31, 1977. The NET Act punishes as a felony any violations of such a copyright, if the Act's thresholds are met. Thus, for example, persons who violate

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[1] The Internet is a network of computers that are linked to one another by phone lines, modems and other networking technologies in order to share resources. The Internet has over 100 million users worldwide. The posting of a work on the Internet makes it easy to access, read and copy that work. Because of the popularity of the Internet, moreover, any single copy of a work that is posted on the Internet can be read and copied many times over each month.

the copyright of a work created in 1923 face criminal prosecution.

D. Effect Of The CTEA On Plaintiffs

Eric Eldred and Eldritch Press

27. Eric Eldred founded the Eldritch Press in late 1995 as a means of demonstrating that computers could be used to present books on the Internet in new ways, and in ways that improved upon the capabilities of print books. The Eldritch Press posts books on its Web site[2] located on the Internet at http://eldred.ne.mediaone.net. Initially, the Eldritch Press began with works of American literature, by authors such as Nathaniel Hawthorne, Oliver Wendell Holmes (Sr.), and Henry James. The Eldritch Press also has specialized collections of works such as World War I novels, writings about small boats, French and Russian literature (with some bilingual works), science and natural history, and works appropriate for reading aloud to children. It also has works of general interest, such as H. L. Mencken's "Declaration of Independence in American" and Louisa May Alcott's "An Old-Fashioned Thanksgiving." Because some of the works are not included in library collections or are long out of print, they are not obtainable in any other way. All of the works are in hypertext markup language ("HTML"), are hand-coded, can be found by most common Internet search engines, and are accessible by all Web browsers.

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[2] The "World Wide Web" is a collection of easily accessible files and databases located on servers on the Internet. These servers are known as "Web sites" which provide resources associated with a certain person or organization. An individual or organization with a Web site can "post" a message, document, or other type of information on the Web site. A file that is posted on a Web site generally can, at the discretion of the Web site operator, be opened, read and copied (or "downloaded") by anyone who has access to the Internet.

28. Works are derivative as well as exact reprints. In fact, because of the higher capabilities of electronic books, the Eldritch Press has added features to some of these works. These include color illustrations, notes, links to other Internet sources, bibliographies, modernized translations, glossaries, timelines of dates, maps, essay contests, discussion pages, distance learning via e-mail, all linked back to authoritative texts. All of these works also are accessible to blind readers through text-to-speech equipment. In addition, some of the works include text descriptions of art to further assist the blind.

29. The Eldritch Press Web site is globally accessible. The site receives as many as 4,000 visitors per day and has been accessed from virtually all countries in the world. It was been recognized as one of the 20 best humanities sites on the Web from edSITEment (National Endowment for the Humanities); its Hawthorne and Howells pages have been accepted as links by the Nathaniel Hawthorne Society and the William Dean Howells Society Web sites.

30. All works posted on the Eldritch Press Web site are in the public domain or are posted with the permission of copyright holders. Eldred personally researches each work before it is posted to determine whether it is copyrighted.

31. Eldred and Eldritch Press often post works on the Eldritch Press Web site as soon as the works come into the public domain. Thus, beginning in early 1999, Eldritch Press' Web site would have begun featuring literary works that had been created in 1923, such as "New Hampshire" by Robert Frost, "Horses and Men" by Sherwood Anderson, and "Racundra's First Cruise" by Arthur Ransome. Because of the CTEA's enactment, if Eldred or the Eldritch Press posted such works on the Eldritch Press Web site, they would violate both the work's copyright and the criminal provisions of the NET Act. 17 U.S.C. § 506(a).

32. Eldred and Eldritch Press do not accept donations of money or advertisements. The Eldritch Press, being a non-profit association with a meager budget, does not have the funds to pay for any fine levied against it if it were found guilty of violating the NET Act.

Higginson Book Company

33. The Higginson Book Company is a for-profit sole proprietorship that has been a book dealer since 1969 and has been reprinting books for the last twenty years. Higginson reprints books based on consumer demand in fields such as genealogy, historic maps, local and county history, and the Civil and Revolutionary Wars. Higginson has over 10,000 books available for sale. It focuses on books originally printed in small editions that are no longer in print and therefore difficult to obtain from any other source. Higginson has 30,000 active customers, including individuals, libraries, historians, schools and universities. It is located on the Internet at http://www.higginsonbooks.com.

34. Higginson only reprints works that are in the public domain or with the permission of the copyright holders. Higginson's officers and employees carefully research any book published after 1922 to determine whether or not it is copyrighted, but this is often very difficult given the rarity of the books in which they specialize. Higginson therefore must often wait until a book is in the public domain before it can reprint the book.

35. Higginson expected that works such as "History of Lawrence Massachusetts, with War Records," by Maurice B. Dorgan, copyrighted in 1924, would enter the public domain at the end of 1999. The CTEA prevented such works from entering the public domain for another 20 years. Because of the difficulties in tracking the owners of, or heirs to, the copyrights on old works, the CTEA effectively means that Higginson will be unable to reprint any books

copyrighted in 1923 or after for at least another 20 years. If Higginson were to reprint such books, it would violate the book's copyright and the criminal provisions of the NET Act. 17 U.S.C. § 506(a).

Jill A. Crandall

36. Plaintiff Crandall is the choir director at St. Gregory the Great Episcopal Church in Athens, Georgia. She is responsible for selecting the music and preparing and leading the choir in singing during the worship services.

37. When selecting choir music Ms. Crandall must choose between music she can freely copy because it is in the public domain and music that is copyrighted and therefore requires her to purchase copies for each choir member. Since music typically costs $1.00 to $3.50 per song per choir member, it is much cheaper to copy music that is in the public domain. For this reason she most frequently selects works that were copyrighted before 1923.

38. The CTEA has prevented Crandall from freely copying works that were copyrighted in 1923, including works by such composers as Ralph Vaughan Williams, Gustav Holst, Charles Ives and Edward Elgar. If Crandall were to copy and perform copyrighted music it would violate the work's copyright and she would be subject to a copyright infringement action.

Tri-Horn International

39. Tri-Horn International is a closely-held company started in 1993. Tri-Horn is in the business of developing and selling products relating to the history and traditions of golf. Certain of these products use images of famous golfers or golf scenes.

40. The 1920's were an important decade in the history of golf; therefore many images and other artistic works portraying the sport are from this decade. Tri-Horn

International had planned to use works from 1923 and later years, such as pictures of golfers Bobby Jones and Walter Hagen, and incorporate these works into new products.

41. The CTEA has impeded Tri-Horn's plans to use pictures and other materials from the 1920's in its products. The CTEA's retroactive extension of copyright terms has raised significant problems for Tri-Horn because it is difficult, if not impossible, to research the copyright history of many works and to obtain permission to use them. Therefore some of the products Tri-Horn originally planned to produce may never be made. If Tri-Horn were to copy and make such derivative works without permission, it would be subject to copyright infringement actions as well as criminal prosecution. 17 U.S.C. § 506(a).

Luck's Music Library, Inc.

42. Luck's Music Library, Inc. ("Luck's") specializes in selling and renting classical orchestral sheet music. Luck's sells and rents music to approximately 7,000 orchestras and 12,000 individuals worldwide. The music Luck's distributes ranges from elementary-level to operatic.

43. Much of the music Luck's sells or rents is in the public domain. As a general rule, Luck's sells and rents music in the public domain at much lower prices than copyrighted music. For example, "Alborada Del Gracioso" by Maurice J. Ravel, which was written in 1923, is rented to community orchestras for $360.00 for two performances. Before enactment of the CTEA, Luck's had planned to begin selling the piece for $150.00 (to be performed an unlimited number of times) once it entered the public domain on January 1, 1999.

44. The CTEA prevented the Ravel piece and many others from entering the public domain at the end of 1998, adversely affecting Luck's business. If Luck's were to reproduce and sell such works, it would violate the work's copyright and the criminal provisions of the NET Act. 17

U.S.C. § 506(a). The CTEA also impedes the ability of orchestras, many of which have small annual budgets, from playing these famous works.

Edwin F. Kalmus & Co., Inc.

45. Edwin F. Kalmus & Co., Inc. ("Kalmus") is a for-profit corporation located in Boca Raton, Florida that publishes public domain music for orchestras. Masters Music, a division of the publishing company, specializes in publishing piano, solo and chamber music that is in the public domain. Kalmus has approximately 8,500 active customers.

46. Kalmus publishes a catalog at the beginning of every school year listing the titles of works that will be available for purchase. Kalmus's Fall 1998 catalog contained a list of works that it thought would be available on January 1, 1999, when the works were scheduled to enter the public domain. This list included works by such composers as Bela Bartok, Maurice J. Ravel and Richard Strauss.

47. The CTEA has adversely affected Kalmus's business. After the CTEA was passed, Kalmus was forced to distribute a correction to its catalog to notify its customers that works copyrighted in 1923 would not enter the public domain until January of 2019. Moreover, since Kalmus almost exclusively publishes music that has entered the public domain, Kalmus has been effectively prevented from adding any new works to its catalogs for the next 20 years.

American Film Heritage Association and Moviecraft, Inc.

48. The American Film Heritage Association ("AFHA") is a non-profit film preservation group. The AFHA was established to represent documentary filmmakers, film preservationists, scholars, commercial archives and non-profit archives in opposing copyright term extension laws

because of their significant adverse effects on film preservation, archival stock footage use and documentary film making.

49. Moviecraft, Inc. is a commercial film archive that is in the business of restoring and selling rare older films. Older films, such as those from the 1920's, are constantly deteriorating and in need of restoration. The Library of Congress has defined many of these films as "Orphan Works" because they are not being exploited by anyone; thus, while the films may be under copyright, the companies that produced them are no longer in existence or they have abandoned these films because of their age or ephemeral nature. Orphan Works make up a significant portion of the body of silent films.

50. Because the CTEA extends the copyrights on many of these films for 20 more years, Moviecraft will be unable to restore these films and many of them will be lost forever. If a surviving print of one of these works from the 1920's were discovered by Moviecraft, it could not be restored because Moviecraft could not exploit the film without authorization of the copyright owner. To acquire copyright clearances often is impossible. In the case of Orphan Works, the film preservationist cannot find a copyright owner because so much time has elapsed. For example, Moviecraft has a partial print of the film "Dixie," a civil war drama produced in 1924. Moviecraft had originally planned to restore this film when it was scheduled to enter the public domain at the end of 1999. Now, however, since "Dixie" will not enter the public domain for 20 more years, Moviecraft cannot restore the footage without exposing itself to actions for copyright infringement and criminal prosecution. 17 U.S.C. § 506(a).

Dover Publications, Inc.

51. Dover Publications, Inc. ("Dover") is a large-scale publisher of paperback books including adult fiction and

children's books. Dover currently has approximately 6,500 titles in print, and an average of 400 new titles are added each year. Dover annually sells approximately 15,000,000 copies, and it has a current inventory of over 10,000,000 books.

52. Dover enjoys a considerable reputation for making English-language and translated foreign-language books readily available to interested readers at affordable prices when sold either through local bookstores or directly to catalog customers. Approximately one-third of Dover books are reprints from public domain sources, many of which would otherwise be completely out-of-print.

53. Dover had considerable plans, based on extensive research, to republish works from the 1920's and 1930's in the coming years when they were to enter the public domain. For example, this year Dover had planned to republish works copyrighted in 1923 such as "The Prophet" by Kahlil Gibran, 'The Harp-Weaver and Other Poems" by Edna St. Vincent Millay and "Tulips and Chimneys" by e.e. cummings. The CTEA has prevented Dover from republishing these works at reasonable price levels for twenty more years. If Dover were to republish these works without permission from the copyright holders it would be subject to criminal prosecution under the NET Act as well as actions for copyright infringement.

Copyright's Commons

54. Copyright's Commons is a non-profit coalition located at the Berkman Center for Internet and Society at Harvard Law School. The coalition is devoted to promoting the public availability of literature, art, music and film. Copyright's Commons serves as a collective voice for students, professors, archivists and members of the public who are concerned about the CTEA's negative effects on a vibrant public domain. Membership in Copyright's

Commons is open to any person by means of its web page, located at http://cyber.law.harvard.edu/cc.

55. Members of Copyright's Commons routinely use, reproduce, reprint, perform, enhance, restore or sell works of music, art, film or literature in the public domain. Because the CTEA has prevented works from the 1920's and 1930's from entering the public domain for another 20 years, members of Copyright's Commons who had planned to use or reproduce works created in 1923 have been prevented from doing so for fear of being sued for copyright infringement or prosecuted under the NET Act. 17 U.S.C. § 506(a).

COUNT ONE

56. Plaintiffs repeat and reallege paragraphs 1 through 55.

57. The copyright laws grant the owners of a copyright in a literary, artistic or musical work the exclusive right to reproduce, distribute, perform, or display that work, or derivative works. 17 U.S.C. § 106. Therefore, the posting of a copyrighted literary work on the Internet, the selling of a copyrighted literary work, the copying and selling of copyrighted music, the use of a copyrighted artistic work in creating a new work, or the restoration and selling of a copyrighted film, without the permission of the copyright owner, would be copyright infringement pursuant to 17 U.S.C. § 501 *et seq*.

58. Article 1, Section 8 of the United States Constitution grants Congress the authority to:

> To promote the Progress of Science and useful Arts, by securing for *limited* Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

(Emphasis supplied). The purpose of this grant of power to Congress was to empower Congress to pass laws granting a limited monopoly over original works of authorship in order to provide incentives to artists, authors, composers, inventors, playwrights, poets, and sculptors to produce new works. Any grant of exclusive rights then (a) must be for this limited purpose, by granting (b) a limited term (c) to authors. A grant of an exclusive right that was not for this limited purpose, or was not for a limited term, or was not a grant to authors, would fall outside the narrow exception to the Free Speech and Press Clause of the First Amendment established by the Copyright Clause.

59. The historical antecedents of the Constitution, the record of the deliberations surrounding the drafting and adoption of the Constitution and contemporaneous evidence explaining the background and context of this language confirm this plain reading of Article I, § 8, and demonstrate that the clause was designed to assure that a balance was struck between providing incentives to "Authors and Inventors" on the one hand, and assuring the eventual and inevitable entry of their work into the public domain.

60. Despite these requirements that the term of copyright be limited, and the purpose be to "promote the progress of science and useful arts," Congress has repeatedly extended the term of copyright, both prospectively (to works not yet in existence), and retrospectively (to works with subsisting copyright terms). It has, in other words, given future authors a longer period to recover for any works they copyright in the future, and it has given past authors a longer period to recover for works they already have produced.

61. The present term is far longer than the framers ever envisioned. The original copyright statute of 1790 granted copyright terms of 14 years, with a 14 year renewal period. In 1831 the original copyright term was extended to 28 years, while the renewal term remained at 14 years. The

renewal term was lengthened from 14 to 28 years in 1909, creating a total possible copyright term of 56 years. There it stayed for more than half a century.

62. Beginning in 1962, Congress enacted a succession of laws that extended copyright terms for those copyrighted works whose terms were about to expire. The overall effect of these laws was to extend copyright terms to periods as long as 70 years. Then, in 1976, Congress enacted Pub. L. 94-553 which gave subsisting copyrights a total term of 75 years. Finally, the CTEA extended this 75-year term by 20 more years. The following table chronicles the extensions of the copyright terms:

Year	Law	Copyright Term Extension	Maximum Copyright Term
1962	Pub. L. 87-668	Subsisting copyrights extended to 12/31/65	59 years
1965	Pub. L. 89-142	Subsisting copyrights extended to 12/31/67	61 years
1967	Pub. L. 90-141	Subsisting copyrights extended to 12/31/68	62 years
1968	Pub. L. 90-416	Subsisting copyrights extended to 12/31/69	63 years
1969	Pub. L. 91-147	Subsisting copyrights extended to 12/31/70	64 years
1970	Pub. L. 91-555	Subsisting copyrights extended to 12/31/71	65 years
1971	Pub. L. 92-170	Subsisting copyrights extended to 12/31/72	66 years
1972	Pub. L. 92-566	Subsisting copyrights extended to 12/31/74	68 years
1974	Pub. L. 93-573	Subsisting copyrights extended to 12/31/76	70 years
1976	Pub. L. 94-553	Subsisting copyrights extended to 75 year total term	75 years
1998	Pub. L. No. 105-298	Subsisting copyrights extended to 95 year total term	95 years

63. While formally, under each of these extensions, the term is limited, the practice of continually extending copyright terms retroactively means that Congress, in effect, is granting copyright holders more than a "limited term."

64. Because these retroactive extensions are for works that already exist, they do not "promote the progress of science and useful arts."

65. The CTEA therefore violates the restrictions of Article I, § 8 and is unconstitutional.

(a) The CTEA confers benefits retroactively. This can have no rational basis, since no incentive to future individual creativity is provided by conferring an economic reward upon someone who has already created the work in question.

(b) The CTEA confers benefits to someone to whom the creator of the work transferred or sold the rights in the work in a transaction that contemplated a shorter copyright term. This is outside the constitutional power to grant rights to "Authors" and this too can create no incentive to future individual creativity.

(c) Whatever may be said about the benefits living authors can receive from continued royalties for preexisting works whose term of protection has been retroactively extended, the same may not be said about dead authors. Since dead authors cannot create new works, the sole incentive that copyright is intended to provide—bringing new works to market—cannot be fulfilled. Nevertheless, Congress has retroactively bestowed the extended term on assignees of dead authors, violating the constitutional limitation of promoting the progress of science.

66. Since the unconstitutional sections of the CTEA are not severable from the remainder of the CTEA, the entire act must be declared unconstitutional.

67. A declaratory judgment will terminate the controversy between the parties.

COUNT TWO

68. Plaintiffs repeat and reallege paragraphs 1 through 55.

69. While copyright creates a present interest in the copyright holder, it simultaneously creates a future interest in the public. The Public Trust Doctrine holds that government may not transfer the public property of a commons into private hands in the absence of any public benefit in exchange. While this doctrine has traditionally been applied in the context of public lands, the same principle should apply to the reallocation of public rights in intangible property, such as copyright.

70. The retroactive extension of the CTEA transfers those future interests from the public to private parties. The free use of such works by the public as a whole, contemplated both by the public and the creators of the works under copyright terms prevailing at the time of the works' creation, is thus pretermitted.

71. The only legitimate aim that Congress may have in effecting a transfer of public intangibles is that aim specified in the copyright clause—to "promote the progress of science and the useful arts." A retroactive extension will not promote that progress.

72. The retroactive extension of the term of copyrights attempted by Section 102(d)(1)(B) of the CTEA is therefore an abdication by the government of control of public resources held for the common use in violation of the Public Trust Doctrine.

73. Since the unconstitutional sections of the CTEA are not severable from the remainder of the CTEA, the entire act must be declared unconstitutional.

74. A declaratory judgment will terminate the controversy between the parties.

COUNT THREE

75. Plaintiffs repeat and reallege paragraphs 1 through 55.

76. The First Amendment restricts Congress's power to "make" any law "abridging the freedom of speech, or of the press."

77. The CTEA restricts plaintiffs' speech. But for the CTEA, plaintiffs could, without threat of legal punishment, publish works originally copyrighted in 1923, and whose copyrights are presently subsisting. If the CTEA stands, plaintiffs can only publish such works with the permission of the copyright holder.

78. Whether the restrictions of the CTEA are consistent with the requirements of the First Amendment depends upon the application of First Amendment principles to the statute.

79. Whether the CTEA is considered a content-based restriction on speech, or a content-neutral restriction on speech, it restricts speech unconstitutionally. Even under the lesser standard of intermediate scrutiny, the government cannot establish that the CTEA "advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than is necessary to further those interests." *Turner Broadcasting Systems v. FCC*, 520 U.S. 180, 189 (1997).

80. Since the unconstitutional sections of the CTEA are not severable from the remainder of the CTEA, the entire act must be declared unconstitutional.

81. A declaratory judgment will terminate the controversy between the parties.

WHEREFORE, plaintiffs Eric Eldred, Eldritch Press, Higginson Book Company, Jill A. Crandall, Tri-Horn International, Luck's Music Library, Inc., Edwin F. Kalmus Co., American Film Heritage Association, Moviecraft, Inc., Dover Publications, Inc. and Copyright's Commons request that this Court enter judgment:

1. Declaring that 17 U.S.C. § 304(b), as amended by the CTEA, is unconstitutional;

2. Enjoining defendant, her successor and their subordinates from enforcing the NET Act, 17 U.S.C. 506(a), against persons whose infringement of a copyright would not have happened but for the CTEA's amendment of 17 U.S.C. § 304(b);

3. Awarding plaintiffs the costs of this action, including reasonable attorneys' fees; and

4. Awarding such further relief as the Court deems just and appropriate.

Dated: June 24, 1999

Respectfully submitted,

/s/
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ERIC ELDRED, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No.
	)	1:99CV00065 JLG
JANET RENO, in her official capacity as Attorney General of the United States,	)	
	)	
Defendant.	)	

ANSWER TO SECOND AMENDED COMPLAINT

Defendant Janet Reno, Attorney General of the United States, hereby answers plaintiffs' Second Amended Complaint in this action as follows:

FIRST DEFENSE

Plaintiffs' Second Amended Complaint fails to state a claim upon which relief may be granted.

SECOND DEFENSE

In response to the introductory paragraph of plaintiffs' Second Amended Complaint, defendant admits that plaintiffs seek the relief described therein, and denies that plaintiffs are entitled to such relief. Defendant answers the numbered paragraphs of plaintiffs' Second Amended Complaint as follows:

1. - 11. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in these paragraphs.

12. Admitted.

13. The first sentence contains plaintiffs' conclusions of law regarding the Court's subject matter jurisdiction, in response to which no answer is required, but insofar as an answer may be deemed required, defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this sentence. The second sentence is denied, except to admit that there is personal jurisdiction over defendant in her official capacity as Attorney General of the United States. The third sentence is admitted.

14. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

15. In response to the first sentence, defendant admits that there are civil and criminal remedies for infringement of copyrights, the duration of which was extended by the CTEA. The second sentence is denied.

16. The allegations in this paragraph are denied, except defendant lacks knowledge or information sufficient to form a belief as to the truth of plaintiffs' allegation that they fear prosecution by defendant for violations of the No Electronic Theft Act of 1997 ("NETA").

17. Admitted.

18. The first sentence is admitted. The second sentence is denied, except to admit that the quoted passage was in effect during the period between January 1, 1978 and October 26, 1998.

19. Admitted.

20. The first sentence is admitted. The second sentence is denied, except to admit that works in the public domain are not subject to copyright restrictions unless they are derived from an underlying work that remains subject to a valid copyright.

21. Admitted.

22. The first sentence is admitted. The second sentence is denied, except to admit that, if the Sonny Bono Copyright Term Extension Act of 1998 ("CTEA") had not been enacted, the term of copyrights secured in 1923, and subsequently renewed, would have expired on December 31, 1998. The third sentence is admitted.

23. This paragraph contains plaintiffs' characterization of the NETA, Pub. L. No. 105-147, 111 Stat. 2678, in response to which no answer is required, but insofar as an answer may be deemed required, defendant admits that the quoted passage appears in 17 U.S.C. § 506(a), as amended by the NETA.

24. This paragraph contains plaintiffs' characterization of 18 U.S.C. § 2319(c), in response to which no answer is required, but insofar as an answer may be deemed required, the allegations are denied, except to admit that the quoted passage appears in that section.

25. This paragraph contains plaintiffs' characterization of the NETA, Pub. L. No. 105-147, 111 Stat. 2678, in response to which no answer is required, but insofar as an answer may be deemed required, the allegations are denied except to admit that 17 U.S.C. § 506(a), as amended by the NETA, encompasses the "reproduction or distribution, including by electronic means," of copyrighted works in the circumstances identified in the statute. The Court is respectfully referred to the cited provisions for a complete and accurate statement of their contents. In response to footnote 1 of this paragraph, defendant admits the allegations in the first sentence, and lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations, except to admit that certain information posted on the Internet can be read and copied many times over each month.

26. The first sentence is denied, except to admit that the CTEA extended for 20 years certain copyrights on literary, musical and artistic works, including certain copyrights with renewal terms subsisting between December 31, 1976 and

December 31, 1977. The second and third sentences contain plaintiffs' characterization of the NETA, Pub. L. No. 105-147, 111 Stat. 2678, in response to which no answer is required, but insofar as an answer may be deemed required, the allegations are denied except to admit that 17 U.S.C. § 506(a), as amended by the NETA, provides that certain types of willful copyright infringement specified in the statute shall be punished as provided under section 2319 of Title 18.

27. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph, except defendant admits the allegations contained in footnote 2 of this paragraph.

28. - 30. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in these paragraphs.

31. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph except to admit that 17 U.S.C. § 506(a), as amended by the NETA, provides that certain types of willful copyright infringement specified in the statute shall be punished as provided under section 2319 of Title 18.

32. - 34. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in these paragraphs.

35. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph except to admit that 17 U.S.C. § 506(a), as amended by the NETA, provides that certain types of willful copyright infringement specified in the statute shall be punished as provided under section 2319 of Title 18.

36. - 40. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in these paragraphs.

41. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in the first sentence of this paragraph. The second sentence is denied, except defendant lacks knowledge or information sufficient to form a belief as to the truth of plaintiffs' allegation that plaintiff Tri-Horn International has encountered difficulties in researching the copyright history of, and obtaining permission to use, many unspecified works. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph, except to admit that 17 U.S.C. § 506(a), as amended by the NETA, provides that certain types of willful copyright infringement specified in the statute shall be punished as provided under section 2319 of Title 18.

42. - 43. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in these paragraphs.

44. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph, except to admit that 17 U.S.C. § 506(a), as amended by the NETA, provides that certain types of willful copyright infringement specified in the statute shall be punished as provided under section 2319 of Title 18.

45. - 49. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in these paragraphs.

50. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph, except to admit that 17 U.S.C. § 506(a), as amended by the NETA, provides that certain types of willful copyright infringement specified in the statute shall be punished as provided under section 2319 of Title 18.

51. - 52. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in these paragraphs.

53. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph, except to admit that 17 U.S.C. § 506(a), as amended by the NETA, provides that certain types of willful copyright infringement specified in the statute shall be punished as provided under section 2319 of Title 18.

54. - 55. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in these paragraphs.

56. In response to this paragraph, defendant incorporates herein by reference her answers to paragraphs 1 through 55 of plaintiffs' Second Amended Complaint.

57. This paragraph contains plaintiffs' characterization of 17 U.S.C. §§ 106 and 501 et seq., in response to which no answer is required, but insofar as an answer may be deemed required, the allegations are denied, except to admit that the cited provisions confer the rights and impose the obligations stated in those provisions.

58. The first three sentences of this paragraph contain plaintiffs' characterizations of, and legal conclusions concerning, Article I, Section 8 of the United States Constitution, in response to which no answer is required, but insofar as an answer may be deemed required, the allegations are denied, except to admit that Article I, Section 8 of the Constitution empowers Congress "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." The fourth sentence is denied.

59. The allegations in this paragraph are denied, except to admit that, pursuant to Article I, Section 8 of the Constitution, Congress is empowered to determine what balance should be struck between providing incentives to "Authors and Inventors" and providing for the eventual entry of their work into the public domain.

60. The first sentence is denied, except to admit that, consistent with the requirements of Article I, Section 8, of the Constitution, Congress has enacted legislation to "promote the Progress of Science and useful Arts" by extending for a limited term both copyrights for works not yet in existence and existing works with subsisting copyright terms. The second sentence is admitted.

61. The first sentence is denied. The remaining allegations in this paragraph are admitted.

62. The first three sentences are admitted. The fourth sentence is denied, except to admit that the CTEA extended the term of a subsisting pre-1978 copyright to 95 years from the date the copyright was originally secured. The fifth sentence is admitted, except defendant affirmatively avers that none of the public laws referenced in this sentence altered or affected the term of any presently effective copyright with the exception of those enacted in 1976 and 1998.

63. The allegations in this paragraph are denied, except to admit that, under each of these extensions, the term is limited.

64. Denied.

65. The allegations in this paragraph are denied, and the Court is respectfully referred to the CTEA for a complete and accurate statement of its contents.

66. Denied.

67. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph, except defendant denies that plaintiffs are entitled to a declaratory judgment or to any relief whatsoever.

68. In response to this paragraph, defendant incorporates herein by reference her answers to paragraphs 1 through 55 of plaintiffs' Second Amended Complaint.

69. The first sentence is denied, except to admit that a copyright creates an interest in the copyright holder for a limited term prescribed by statute after which the copyrighted work falls within the public domain. The second and third sentences are denied.

70. The first sentence is denied. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in the second sentence of this paragraph, except to admit that the copyright laws place restrictions on the use of copyrighted works for the period during which the copyright remains effective and during any extensions of that period.

71. - 73. Denied.

74. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph, except defendant denies that plaintiffs are entitled to a declaratory judgment or to any relief whatsoever.

75. In response to this paragraph, defendant incorporates herein by reference her answers to paragraphs 1 through 55 of plaintiffs' Second Amended Complaint.

76. This paragraph contains plaintiffs' characterization of the First Amendment to the United States Constitution, in response to which no answer is required, but insofar as an answer may be deemed required, the allegations are denied, except to admit that the quoted language has been excerpted from the First Amendment. The Court is respectfully referred to the text of that amendment for a complete and accurate statement of its contents.

77. The first sentence is denied, except to admit that the Copyright Act, as amended by the CTEA, places certain restrictions on the use of copyrighted works. The second sentence is denied, except to admit that, but for the CTEA, copyright restrictions on the publication of certain works copyrighted in 1923, whose copyrights are presently subsisting,

would have expired on December 31, 1998. The third sentence is denied, except to admit that, if the CTEA stands, plaintiffs may publish copyrighted works with the permission of the copyright holder.

78. Denied, except to admit that the restrictions of the CTEA are consistent with the requirements of the First Amendment.

79. - 80. Denied.

81. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph, except defendant denies that plaintiffs are entitled to a declaratory judgment or to any relief whatsoever.

Defendant denies all allegations in plaintiffs' Second Amended Complaint not otherwise answered herein. In addition, defendant denies that plaintiffs are entitled to the relief sought in the prayer for relief in plaintiffs' Second Amended Complaint, or to any relief whatsoever.

WHEREFORE, defendant respectfully requests that plaintiffs' prayer for relief be denied, that this action be dismissed, and that defendant be awarded her costs and such other relief as may be appropriate.

Respectfully submitted.

DAVID W. OGDEN
Acting Assistant Attorney General

WILMA A. LEWIS
United States Attorney

/s/
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ERIC ELDRED, ELDRITCH PRESS, HIGGINSON BOOK COMPANY, JILL A. CRANDALL, TRI-HORN INTERNATIONAL, LUCK'S MUSIC LIBRARY, INC., EDWIN F. KALMUS & CO., INC., AMERICAN FILM HERITAGE, ASSOCIATION, MOVIECRAFT, INC., and COPYRIGHT'S COMMONS,	)	
Plaintiffs,	)	Case No. 1:99CV00065 JLG
v.	)	
JANET RENO, in her official capacity as Attorney General of the United States,	)	
Defendant.	)	

DECLARATION OF DENNIS S. KARJALA

STATE OF ARIZONA)
) ss.:
COUNTY OF COCONINO)

Dennis S. Karjala, under the penalties of perjury, declares:

1. My name is Dennis S. Karjala. I am a Professor of Law at Arizona State University, where my primary field of research and writing is copyright law. From 1993 I was active in opposing legislative adoption of what eventually became the

Sonny Bono Copyright Term Extension Act of 1998 (CTEA). In the course of these activities, numerous examples have come to my attention showing the reliance of current authors on the public domain in creating new works, as well as transaction costs to the public resulting from copyright protection. These examples are all drawn from publicly available sources. I make this declaration in support of plaintiffs' motion for entry of judgment on the pleadings or, in the alternative, summary judgment.

2. The Disney Corporation has based many popular films on public domain stories or music:

The Adventures of Ichabod and Mr. Toad (based on the stories by Washington Irving)
Aladdin (old folk tale)
Alice in Wonderland (based on the book by Lewis Carroll)
Beauty and the Beast (old folk tale)
Cinderella (old folk tale)
Fantasia (Stravinsky's Rite of Spring music, in the public domain in the U.S.)
Hercules (based on mythical Greek character)
The Hunchback of Notre Dame (based on the novel by Victor Hugo)
The Little Mermaid (old folk tale)
Mulan (Chinese folk tale)
Pinocchio (old folk tale)
Pocahontas (historical character, in the public domain)
Sleeping Beauty (old folk tale)
Snow White and the Seven Dwarfs (old folk tale)
Tarzan (public domain character used as basis for new story)
The Three Musketeers (public domain novel)
Twenty Thousand Leagues Under the Sea (public domain novel)

3. Many other films and popular plays and musicals have been made based on, and often changed from, public domain works. A few examples include:

2001, A Space Odyssey (new film using public domain music)
The Brothers Karamazov (based on the Dostoyevsky novel)
Clueless (derived from Jane Austen's *Emma*)
Dracula (based on the public domain character)
Godspell (musical based on the Gospel according to St. Matthew, also making use of at least three sets of public domain song lyrics, "Day by Day" attributed to St. Richard of Chicheseter (1197-1253), "When Wilt Thou Save the People" by Ebenezer Elliot (1781-1849), and a public domain translation by Jane Montgomery Campbell (1817-1878) of the public domain song "Das Bauernlied" by German poet Matthias Claudius (1740-1815)
Island of Dr. Moreau by H.G. Wells was the basis of three feature films:
Island of Lost Souls (1933)
Island of Dr. Moreau (1977)
Island of Dr. Moreau (1996)
Jesus Christ Superstar (musical based on the Bible)
Les Miserables (musical based on the Victor Hugo classic)
Miss Saigon (based on Madame Butterfly)
Of Human Bondage (1934 with Betty Davis and 1964 with Kim Novak, based on the novel by W. Somerset Maugham)
Ragtime (play based on public domain music)
Rosencrantz and Guildenstern are Dead (derived from Hamlet)
The Scarlet Letter (derived from the Hawthorne novel)
Sense and Sensibility (based on the novel by Jane Austen)

The Seven Percent Solution (based on the character Sherlock Holmes)
The Sting (new film using public domain music of Scott Joplin)
The Ten Commandments (derived from the Bible)
Tess of the D'Urbervilles (based on the novel by Thomas Hardy)
The Three Musketeers (eight films have been based on the novel by Dumas, 1916, 1921, 1933, 1935, 1939, 1948, 1974, and 1993 (Disney))
Twenty Thousand Leagues Under the Sea (1916 & 1954 (Disney), based on the novel by Jules Verne, plus two completely different made for TV films in 1998)
West Side Story (musical derived from Romeo and Juliet)
The Wings of the Dove (based on the novel by Henry James)

4. Frank Capra's film *It's a Wonderful Life* was virtually unknown when its copyright lapsed on February 6, 1975 due to failure of the copyright owner to renew the copyright. Since then the film has experienced a hugely expanded interest. As many as 100 companies have offered *It's a Wonderful Life* on video, and it was widely shown on television, beginning from Thanksgiving through the entire Christmas season. (It is not seen as much anymore because of claimed copyright rights in the underlying unpublished story.) The film is now a widely loved classic.

5. Nitrate motion picture stock, on which all films were printed at least until very recent times, assures the eventual decomposition of the original negative as well as surviving prints. Many motion pictures and videotapes exist only in single negatives or master tapes, subject to decomposition. These include countless numbers of abandoned and long-forgotten feature films, short subjects, non-theatrical business and educational films, documentaries, and scientific and research footage. Many films, especially silent films from the 1920's, no longer exist even in a single copy because of deterioration.

6. Small suppliers of public domain films can successfully release silent film titles in low volume, in part due to their low overhead and in part because they have to pay no royalties. These small public domain motion picture dealers naturally compete on price, but because they offer a motion picture product to select niche audiences, they seek to compete in terms of quality as well. For example, one company offers public domain films along with original previews and reproductions of lobby cards and posters. Several offer videos that, according to their advertising, are made from high quality 35mm prints. Thus, one can shop for a public domain movie on videotape simply based on price, but one can seek the best motion picture reproductions possible as well as ancillary materials. Douglas Gomery, ***Research Report: The Economics of Term Extension for Motion Pictures,*** submitted for the Committee for Film Preservation and Public Access to the Copyright Office in connection with Docket No. RM 93-8, Notice of Inquiry on Duration of Copyright Term of Protection, November 1993 (available at <http://www.public.asu.edu/~dkarjala/commentary/gomery.html>).

7. Book publishers also compete with lower prices and adding ancillary materials once a work goes into the public domain. In practically any bookstore one can find various production-quality versions of classics like *Moby Dick,* from relatively cheap paperback versions to elegantly bound hardbacks. Even among the paperbacks one finds distinctions based on accompanying commentary, introductions, notes, and maps. When a work goes into the public domain, there are almost immediately available several new versions that seek to distinguish themselves to the buying public by making variations along the dimensions of price, production quality, and ancillary materials.

8. The character Santa Claus as we now know him, was the creation of the great 19th-century American cartoonist Thomas Nast, who started from an austere European Father Christmas figure, in the public domain, and transformed him into the

jovial, roly-poly figure that we know today. Uncle Sam was also a creature of Thomas Nast, who took the name "Uncle Sam" and its general patriotic associations from public domain usage and created the image that we know today, which first appeared in an 1868 issue of Harper's magazine. Adam Gopnik, ***The Man Who Invented Santa Claus,*** The New Yorker, Dec. 15, 1997, at 84; Steve Cannon, ***Letter to The Mail,*** The New Yorker, January 19, 1998, at 7. Nast died around 1902, and had the CTEA been in effect in Nash's time, his rights to both Santa Clause and Uncle Sam would have continued until 1973.

9. The works of the American composer George Gershwin were published between 1923 and 1937. Their U.S. copyrights would have expired between 1999 and 2013 under prior law. George Gershwin died in 1937, so all of his works will go into the public domain in Europe no later than 2008, which is near the middle of the prior U.S. range. Under the CTEA, Gershwin's U.S. copyrights will continue until the years 2019 to 2033, although all Gershwin copyrights will have expired in Europe, notwithstanding extension there, in 2008.

10. Sir Arthur Conan Doyle, author of the famous Sherlock Holmes mysteries, died in 1930. Even with the extended copyright in Europe, all of his works will go into the public domain there at the end of the year 2000. His last work was published in 1927, so it was scheduled to go into the public domain in the United States at the end of the year 2002, about the same time as the revived European copyrights on his entire oeuvre. Under the CTEA, those works of Conan Doyle published after 1922 will remain under U.S. copyright for an additional 20 years, long after their expiration in their country of origin.

11. Prices for community and youth orchestras before and after classical works have entered the public domain indicate how consumer costs come down when works enter the public domain. In the table below, the "rental price" was that charged for community and youth orchestras (financially larger

orchestras had to pay more) for two public performances of the music listed. The "current cost" shows the price of the sheet music from Luck's Music Library after the work entered the public domain (at which point the orchestra could perform the work as often as it liked).

Author	Composition	Rental Price	Year in Public Domain	Current Cost
Ravel	Daphnis et Chloe Suite # 1	$ 455	1987	$ 155
Ravel	Mother Goose Suite	$ 540	1988	$ 70
Ravel	Daphnis et Chloe Suite # 2	$ 540	1989	$ 265
Griffes	The White Peacock	$ 335	1993	$ 42
Puccini	O Mio Babbino Caro	$ 252	1994	$ 26
Respighi	Fountains of Roam	$ 441	1994	$ 140
Respighi	Ancient Aires & Dances Ste. # 1	$ 441	1996	$ 85
Elgar	Cello Concerto	$ 550	1997	$ 140
Holst	The Planets	$ 815	1997	$ 300

12. Composers commonly adapt, arrange, or harmonize earlier melodies. Johann Sebastian Bach (1685-1750), for example, was a frequent arranger of older sacred melodies. Bach's arrangement of ***Herzlich tut mich verlangen,*** by Hans Leo Hassler (1564-1612) was itself used by popular songwriter Paul Simon in one of his songs. Humorist John Forster then used the same melody in "Fusion," a satirical comment on Paul Simon's habits of self-promotion. The great American composer Aaron Copeland uses the Shaker melody ***Simple Gifts*** by Joseph Brackett, Jr. (1797-1882) in ***Appalachian Spring.*** The freedom to express oneself using well known melodies or words adapted to new uses is one of the more important features that the public domain brings to current authors.

13. In religious music, lyricists often write additional verses to earlier hymns. For example, under hymn number eighty-one in the Episcopal Church's ***Hymnal 1982*** is the following note: "Words: St. 1-2, German, 15th cent.; tr. Theodore Baker (1851-1934) st. 3, Friedrich Layritz (1808-1859), tr. Harriet Reynolds Krauth Spaeth (1845-1925); ver. Hymnal 1940." Thus, one named author, two named translators, at least one anonymous author, and one church committee, their generations spanning a period of some five hundred years from first to last, all had a hand in putting the words of the hymn into their present form.

14. Old words are often fitted to new melodies for church-hymnals. For example, the words "Come my Way, my Truth, my Life," by George Herbert (1593-1633), are set in the Episcopal Church's ***Hymnal 1982*** to ***The Call,*** an adaptation by E. Harold Geer of a melody by Ralph Vaughan Williams (1872-1958), which was written for these words as part of a suite entitled ***Five Mystical Songs*** (1911). New words are fitted to old melodies, and old words and old melodies are brought together to create a new work. For example, the words "Turn back, O man, forswear thy foolish ways" by Clifford Bax (1886-1962) were written for the 16th-century hymn-tune ***Old 124th.*** These words by Bax were set to still another melody by Stephen Schwartz for the off-Broadway musical ***Godspell.*** (The words used in ***Godspell*** were published in 1919 as part of a work by Gustav Holst (1874-1934).) The hymn-lyric ***O Little Town of Bethlehem*** was written in 1868 by Phillips Brooks (1835-1893), rector of Holy Trinity Church, Philadelphia, and was early set to the melody ***St. Louis*** composed by Lewis H. Redner (1831-1908), who was the organist at the same church. The words are still widely sung to this melody. In recent decades, however, the words have also become associated with a 19th-century English folk tune, ***The Plowboy's Dream*** or ***Forest Green,*** collected early in this century by composer and folk song collector Ralph Vaughan Williams (1872-1958). See The Hymnal 1940 Companion, Church Pension Fund, New York, 1949, p. 17. 389, 539, and Journal of the Folk Song Society #8, 1906, p. 203.

15. Compilers and publishers also benefit from the timely expiration of copyright. After expiration of copyright in *The Sacred Harp* (first edition 1844), at least three different compilers attempted to capture a share of the market for new editions. Revisions of *The Sacred Harp* were produced by William M. Cooper *(The Sacred Harp, Revised and Improved,* 1902), J. L. White *(The New Sacred Harp,* 1884, co-edited by White's brother, B. F. White, Jr; *Fifth Edition of the Sacred Harp,* 1910; and *Fourth Edition of the Sacred Harp,* with Supplement, 1911), [,] and Joseph James, *The Original Sacred Harp,* 1911). Public domain status of *The Sacred Harp* allowed for the free inclusion into other hymnals of many individual hymns from *The Sacred Harp* and other pre-Civil War hymnals. The Episcopal Church's *Hymnal 1982,* for example, contains a number of tunes from pre-Civil War American hymnals.

16. The 1998 version of *Guitar for Dummies* by Mark Phillips and John Chappell (IDG Books, publisher) takes all or nearly all of its musical examples from the public domain. By using only public domain examples, authors can speed up the publishing timetable and reduce the transaction costs of both negotiating a license and the monetary costs of royalties. Thus, because the book attempts to teach how to play a musical instrument, the public domain also serves as a device for promoting learning.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on July 22, 1999.

/s/ _____
DENNIS S. KARJALA

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ERIC ELDRED, ET AL.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:99CV00065 JLG
	)	
JANET RENO	)	
	)	
Defendant.	)	
	)	

AFFIDAVIT OF HAL R. VARIAN

I, HAL R. VARIAN, make oath and say as follows:

1. I am the Dean of the School of Information Management and Systems at the University of California, Berkeley. I hold joint appointments in the Haas School of Business and the Department of Economics and occupy the Class of 1944 University Professorship. I received my S.B. degree from MIT in 1969 and my M.A. and Ph.D. from UC Berkeley in 1973. I have published numerous papers in economic theory, econometrics, industrial organization, public finance, and the economics of information technology. I have been asked by the plaintiffs to provide my opinion on the extent to which the term extensions provided by the Copyright Term Extension Act of 1998 provide additional economic incentives to authors to produce creative works.

2. The decision to invest in producing a creative work is influenced in part by economic considerations. Investing time and money now produces a cash flow in the future, so one must trade off the time and money invested now with the potential returns in the future.

3. In my opinion, extending current copyright terms by 20 years for new works has a tiny effect on the present value of cash flows from creative works and will therefore have an insignificant effect on the incentives to produce such works.

4. In my opinion, there is no economic rationale for applying copyright extension to pre-existing works. The incentives to produce these works are those that existed at the time of creation. If these incentives were deemed adequate at the time, there is no additional social benefit from extending them retrospectively. I base these opinions on the following.

Present Value

5. The economic concept of "present value" offers a way to evaluate future cash flows. If the rate of interest is 10 percent per year, one dollar invested today has a "future value" of $1.10 next year. Conversely, $1.10 next year has a "present value" of one dollar today, and $1 next year has a "present value" of 1/1.10 .91 today. Said another way, 91 cents today will grow into approximately $1 next year at a 10% rate of interest. One dollar invested today will grow to 1.10 x 1.10 1.21 in 2 years; hence $1.21 delivered two years from now is equivalent in present value to $1 today, and $1 in two years is equivalent to approximately 1/1.21 83 cents today. More generally, $1 today grows to (1+r)^n in n years, so that $1 in the future has a present value of 1/(1+r)^n today.

The Value of an Investment

6. At a 10 percent rate of interest, the present value of $1 dollar received 50 years from now is about 0.0085 dollars, or less than 1 cent. This means that an investment that requires spending more than 1 cent now in return for a dollar 50 years in the future is not attractive from an economic point of view.

7. Most investments return a stream of payments rather than a single lump sum payment at some future date. To calculate the present value of such a stream, we must add up the present

values of each individual payment for the year when it will be received.

8. As an example, can calculate the value of $1 received each year for 1-50 years and for the subsequent 51-75 and 76-95 years by summing up the present values of each of these receipts. The following chart summarizes the results of such a calculation, assuming four different interest rates.

	TIME PERIOD		
Interest Rate	**1-50 Years**	**51-75 Years**	**76-95 Years**
.05	$18.26	$1.23 (7%)	$.32 (2%)
.07	$13.80	$.40(3%)	$.07 (0.5%)
.10	$9.92	$.08 (0.8%)	$.01 (0.1%)
.12	$8.30	$.03 (0.3%)	$.00 (.00%)

9. At a 10% rate of interest, the present value of the cash flows 51-75 years in the future is .08 cents—or about 0.8% of the value of the cash flow in the first 50 years (since .08/9.92=0.0081). The present value of the cash flows from 76-95 years is about 1 cent today— or one tenth of a percent of the value of the cash flow in the first 50 years.

Application to Copyright Extension

10. The above calculations show that the value of investment returns after 50 years in the future has a minuscule present value compared to the early returns. Hence the value of the cash flows during these later periods has a tiny effect on the present economic incentives to invest in creative works.

11. The above calculations are conservative in at least three respects. First, we have assumed a constant cash flow during the entire period under consideration. For most creative works, the earnings in the out years are much, much smaller than the earnings in the near years. Second, we have assumed that the cash flows will be delivered with certainty, even 50 years in the future. In reality, the cash flow associated with creative works

in the future is uncertain. It is plausible to assume that the risk increases the further into the future we look, so the expected present value of money delivered in the distant future is even smaller than indicated by the above calculations. Finally, even in the near years, the returns to creative works tends to be relatively risky; interest rates of 10-12% are on the low side for evaluating such risky investments.

Effect of Extending Copyright Term on Already-Created Works

12. Paragraphs 10 and 11 have examined the economic incentive to produce creative works. If the work is already created, then there is no incentive effect at all from lengthening the term of protection. When the work was created the author may have been concerned with the length of the copyright term since it affects the present value of the stream of returns from the author's investment in creating the work. However, once the work has been created, there are no incentive benefits from extending the term. No matter how long we extend the copyright term, we won't get any more works produced by Charles Dickens.

SIGNED UNDER THE PAINS AND PENALTIES THIS 20th DAY OF JULY, 1999.

Hal R. Varian

/s/

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ERIC ELDRED, et al. Plaintiffs,	)	
v.	)	CA 99-0065 (JLG)
JANET RENO, in her official capacity as Attorney General of the United States Defendant.	)	

ORDER

Upon consideration of the parties cross-motions for Judgment on the Pleadings under Fed. R. Civ. P. 12(c), the responses and replies thereto, and for the reasons stated in the accompanying memorandum of law, it is by the Court this 27th day of October 1999,

ORDERED that the Plaintiffs' motion for Judgment on the Pleadings is DENIED; it is further

ORDERED that the Defendant's motion for Judgment on the Pleadings is GRANTED; and it is further

ORDERED that the Clerk shall mail copies of this Order to:

Vincent M. Garvey
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/s/
JUNE L. GREEN
United States District Court Judge

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ERIC ELDRED, et al. Plaintiffs,	)	
v.	)	CA 99-0065 (JLG)
JANET RENO, in her official capacity as Attorney General of the United States Defendant.	)	

MEMORANDUM

Before the Court are the parties' cross-motions for Judgment on the Pleadings pursuant to Fed. R. Civ. P. 12(c), and the responses and replies thereto.[1] Pursuant to 28 U.S.C. § 2201 the Plaintiffs seek a declaratory judgment that Section 102(d) (1) (B) of the Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827 ("CTEA"), amending 17 U.S.C. § 304(b), is unconstitutional.[2]

For the reasons that follow, the Court concludes that the CTEA is not unconstitutional. Accordingly, the Court denies the declaratory judgment requested. As explained more fully below, the Defendant's motion for Judgment on the Pleadings is granted.

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[1] Amici Curiae filed briefs in support of the Defendant.

[2] They also seek, upon the courts finding that the CTEA is unconstitutional, a preliminary and permanent injunctive relief against the criminal enforcement of Section 2(b) of the No Electronic Theft Act of 1997, with respect to works that would not have a valid copyright but for the enactment of Section 102(d) (1) (B) of the CTEA. See Pub. L. No. 105-147, 111 Stat. 2678 ("NET Act"), amending 17 U.S.C. § 506(a). As the court denies the declaratory judgment, it also denies the injunctive relief requested.

I. BACKGROUND

The plaintiffs are Eric Eldred, Eldritch Press, Higginson Book Company, Jill A. Crandall, Tri-Horn International, Luck's Music Library, Inc., Edwin F. Kalmus Co., American Film Heritage Association, Moviecraft, Inc., Dover publications, Inc., and Copyright's Commons. They allege that they each use, copy, reprint, perform, enhance, restore or sell works of art, film, or literature in the public domain. (Second Am. Compl. at 4.) They further allege that they prepared to use in some way works created before 1923 and but for the CTEA they could have legally copied, distributed, or performed these works that would otherwise have entered the public domain. (Second Am. Compl. at 4.)[3]

The Constitution provides that Congress has the power "[t]o promote the [p]rogress of [s]cience and useful [a]rts, by securing for limited [t]imes to [a]uthors and [i]nventors the exclusive [r]ight to their respective [w]ritings and [d]iscoveries." U.S. Const. art. I, § 8, cl. 8. In 1790, pursuant to this power, Congress enacted a federal copyright statute providing for exclusive rights for limited times.[4] Since then, Congress revised and extended these exclusive rights for limited times.[5]

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[3] The Defendant does not deny these allegations or raise standing in any filing. (Ans. Second Am. Compl. at 2.) Unless the plaintiffs' allegation that they prepared to use these works in some way is untrue, the Plaintiffs have constitutional standing as the enactment of the CTEA allegedly caused an injury in fact to their ability to use these works that is redressable by declaratory judgment. See, e.g., Federal Election Commission v. Akins, 524 U.S. 11 (1998)

[4] The original statute provided a copyright for fourteen years and an additional fourteen years if the author was a living U.S. citizen. Act of May 31, 1790, §§ 1 and 3, 1 Stat. 124-125.

[5] See Act of Feb. 3, 1831, ch. 16, § 2, 4 Stat. 436; Act of March 4, 1909, oh. 320, § 23, 35 Stat. 1075, 1080; Act of Oct. 19, 1976, §8 302, 303; Pub. L. No. 94-553, 90 Stat. 2598; see also Pub. L. No. 87-668 (1962); Pub. L. No. 89-142 (1965); Pub. L. No. 90-141 (1967); Pub. L. No. 90416 (1968); Pub. L. No. 91-147 (1969); Pub. L. No. 91-555 (1970);

The latest revision and extension, the CTEA, became law on October 27, 1998. Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827. The CTEA provides for exclusive rights for the life of the author plus 70 years (or for certain works, if the life of the author cannot be ascertained, for 95 years after publication or 120 years after the creation of the work, whichever is shorter). These rights apply to works created on or after January 1, 1978, and works created before then with existing rights subsisting in a renewal term provided by the Copyright Act of 1976.

Plaintiffs allege that the CTEA violates the first amendment. Pls.' Mem. at 35-58, 69-87. They also allege that the retrospective extension of copyright protection is beyond Congress's enumerated power under the copyright clause and violates the public [trust] doctrine. Pls.' Mem. at 23-35, 58-69.

II. Analysis

A. First Amendment Rights

The Plaintiffs' first claim, that the CTEA violates the First Amendment, is not supported by relevant case law. Pls.' Mem. at 35-58, 69-87. The District of Columbia Circuit has ruled definitively that there are no First Amendment rights to use the copyrighted works of others. United Video v. F.C.C., 890 F.2d 1173, 1191 (D.C. Cir. 1989); see Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 556 (1985). Therefore, the Court rejects Plaintiffs' First Amendment claim.

B. Retrospective Extension

1. Enumerated Power

The Plaintiffs next allege that the retrospective extension of copyright protection is beyond Congress's enumerated power

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Pub. L. No. 92-170 (1971); Pub. L. No. 92-566 (1972); Pub. L. No. 93-573 (1974).

under the copyright clause. Pls.' Mem. at 23-35. They allege that the retrospective extension violates the "[l]imited [t]imes" and the "to [a]uthors" terms of the copyright clause. Pls.' Mem. at 23-28.

First, they allege that by changing, on several occasions, the limited times for some copyright grants, the Defendant violated the "[l]imited [t]imes" clause. Pls.' Mem. at 28-33. The Supreme Court has held that Congress defines the scope of the grant of copyrights to authors or to inventors under its copyright clause power.[6] Sony Corporation of America v. Universal City Studios, 464 U.S. 417, 429 (1984). The "[l]imited [t]imes" period is "subject to the discretion of Congress." Pennock & Sellers v. Dialogue, 27 U.S. (2 Pet.) 1, 16-17 (1829). Moreover, Congress has authority to enact retrospective laws under the copyright clause.[7] McClurg v. Kingsland, 42 U.S. (1 How.) 202, 206 (1843). In light of these decisions, the Court concludes that the CTEA's extension of limited times is within the discretion of Congress.

Second, the Plaintiffs allege that the retrospective extension violates the "to [a]uthors" term of the copyright clause.[8] Pls.' Mem. [a]t 33-35. Under the CTEA, if, prior to its enactment, the author agreed in advance to assign rights under the CTEA's extended term, then such an agreement is given effect because there is no contrary presumption that the grant of extended term not be so assigned. 17 U.S.C. §§ 203, 304(c) and 304(d). Although the Plaintiffs allege that the absence of such a presumption violates the "to [a]uthors" term, it does not. The

[6] The introductory language of the copyright clause does not limit this power. Schnapper v. Foley, 667 F.2d 102, 112 (D.C. Cir. 1981).

[7] Within the discretion of Congress, any fixed term is a limited time because it is not perpetual. If a limited time is extended for a limited time then it remains a limited time.

[8] Congress has the power "[t]o promote the [p]rogress of [s]cience and useful [a]rts, by securing for limited [t]imes to [a]uthors and [i]nventors the exclusive [r]ight to their respective [w]ritings and [d]iscoveries." U.S. Const. art. I, § 8, cl. 8.

author may agree to transfer his or her exclusive rights to a third party only for a limited period or, alternatively, subject to any applicable statutory termination right, the author may agree in advance (before a renewal period or term extension commences) to transfer or assign future copyrights conferred upon that author by Congress. Fred Fisher Music Co. v. M. Witmark & Sons, 318 U.S. 773 (1943)

2. Public Trust Doctrine

Lastly, Plaintiffs allege that the retroactive extension of copyright protection violates the public trust doctrine. Pls.' Mem. at 58-59. Under the doctrine, the states hold title to navigable and tidal waters within their boundaries in trust for their people. See, e.g., Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 473-81 (1988); District of Columbia v. Air Florida, Inc., 750 F.2d 1077, 1082-83 (D.C. Cir. 1984). Insofar as the public trust doctrine applies to navigable waters and not copyrights, the retroactive extension of copyright protection does not violate the public trust doctrine.

III. CONCLUSION

For the reasons set forth above, the Defendant's motion for Judgment on the Pleadings, pursuant to Fed. R. Civ. P. 12(c) is granted. An appropriate Order accompanies this Memorandum.

/s/
JUNE L. GREEN
United States District Court Judge

Dated: October 27, 1999